NO. 21538

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD R. TARANTINO,

Appellant,

vs.

SGT. J. EGGER and OFFICER J. MOURNING,

Appellees.

BRIEF FOR APPELLEES

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

DANIEL L. DINTZER and
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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on October 13, 1966 by the United States District Court, Southern District of California, Central Division, granting summary judgment and costs to defendants (Appellees herein), J. F. Egger and J. R. Mourning (sued below as Sgt. J. Egger and Officer J. Mourning). The underlying action was brought by Edward R. Tarantino, by a complaint that was filed on May 17, 1966 in the U. S. District Court, Southern District of California. Said complaint asked that the United States District Court invoke its jurisdiction pursuant to Title 28, U. S. C., Section 1331 and Section 1343(1), (2), (3), and (4), and "VICINAL" Jurisdiction under Title 28, U. S. C., Section

1392, and sought relief under a civil rights action pursuant to Title 42, U.S.C., Sections 1983 and 1985 (C.T. p. 2). The District Court's order of October 13, 1966, certified that it was the opinion of that court that "that defendants J. R. Mourning and J.F. Egger had reasonable and probable cause to arrest and detain the plaintiff, and that the arrest and detention of plaintiff was legally proper, and that the retention by the police department of approximately $10,000.00 found hidden in plaintiff's automobile was legally and properly booked into the Beverly Hills Police Department as evidence and that defendants J. R. Mourning and J. F. Egger did not under color of any statute, ordinance, regulation, custom, or usage of any state or territories subject or cause to be subjected on the plaintiff, Edward R. Tarantino, through the deprivation of any rights, privileges or immunities secured by the Constitution and laws of this nation, and that J. R. Mourning and J. F. Egger did not conspire to interfere with the civil rights of the plaintiff, Edward R. Tarantino and that the defendants J. R. Mourning and J. F. Egger were entitled to summary judgment and costs therein." (C.T. p. 57). The appellant, Edward R. Tarantino, on November 29, 1966, filed in this Court a timely application for appeal, which was granted on January 13, 1967. This Court's jurisdiction accordingly rests upon Title 28, U.S.C. Sections 1291 and 1215.

STATEMENT OF THE CASE

Appellant filed his civil rights complaint on May 17, 1966 (C. T. p. 2).

Appellant filed a "Motion to Institute Declaratory Judgment" under Title 28, U. S. C., Section 2201, on July 22, 1966 (C. T. p. 28). Appellees filed an answer to the latter motion on July 26, 1966 (C. T. p. 32). Appellees filed an answer to appellant's complaint on July 27, 1966 (C. T. pp. 35-37). On October 4, 1966, appellees filed a substitution of attorneys, and a Notice of Motion and Motion for Summary Judgment, along with a Statement of Reasons and Points and Authorities and Affidavits thereon, the proposed Summary Judgment and proposed Findings of Fact and Conclusions of Law (C. T. pp. 47-60).

On October 13, 1966, Summary Judgement was granted to appellees (C. T. p. 60). Appellant filed a Motion for Rehearing on November 2, 1966, which was denied on November 21, 1966 (C. T. p. 83). Appellant's Motion for Leave to Appeal in Forma Pauperis was denied by order of December 6, 1966. On January 13, 1967, this Court made its order granting appellant leave to appeal in Forma Pauperis against defendants Egger and Mourning.

STATEMENT OF FACTS

Appellees, at all times mentioned herein, were and are duly qualified and acting police officers of the City of Beverly Hills, County of Los Angeles, State of California, and were at all times

mentioned in appellant's complaint engaged in the performance of their regular assigned duties as such police officers of said city. Upon reliable information and statements and sworn statements given by witnesses, victims and others criminally involved with the appellant herein, it was determined by appellees, and reasonably suspected by them, that appellant was a member of a certain robbery gang operating in the Los Angeles area and responsible for several crimes in the City of Beverly Hills, California, including an armed robbery of certain civilians named Herbert Kronish and Hazel Kronish, located at 9201 Wilshire Boulevard, Beverly Hills, California.

Appellees, as arresting officers, developed information that the appellant was one of the persons responsible for a robbery which was committed on August 11, 1964 at the residence of Herbert Kronish and Hazel Kronish. Appellees proceeded to the appellant's residence, which was located in Los Angeles, where he was contacted and placed under arrest. Numerous items which were proved to have been taken during the "Kronish robbery" were recovered at the suspect's residence. Appellees were assisted in their arrest by two Los Angeles Police Department radio car officers. (All of the above facts are asserted in appellees' affidavits filed in support of their Motion for Summary Judgment, C. T. p. 51 and p. 53.)

QUESTIONS PRESENTED

Whether the District Court erred in granting appellees' Motion for Summary Judgment and Costs thereon (C. T. p. 60).

SUMMARY OF ARGUMENT

I

THE DISTRICT COURT DID NOT ERR IN GRANTING APPELLEES' MOTION FOR SUMMARY JUDGMENT AND COSTS THEREON.

The District Court clearly did not err in granting appellees' Motion for Summary Judgment herein. The function of a Motion for Summary Judgment is to dispose of cases where there is no genuine issue as to material facts. Rogers v. Girad Trust Co., 159 F. 2d 239 (6th Cir. 1947).

Even assuming that every fact as alleged by appellant is true, appellant has still failed to recite any activities on the part of appellees which were at all unlawful or infringed upon his constitutional rights.

It is appellees' duty as police officers to investigate crimes, gather information and evidence, and proceed to make arrests of suspects when the evidence so gathered leads them to believe that there is reasonable and probable cause for such an arrest.

In the instant case, appellees had positive identification made of appellant as a burglar and robber prior to appellant's arrest.

The only real question raised by appellant's pleadings, is whether appellees being members of the Beverly Hills Police Department, had jurisdiction and authority to make the arrest of appellant in the City of Los Angeles. If said arrest was legal, then the search and seizure that followed would necessarily also be legal.

Appellant, in his complaint, has sought various types of relief. He has questioned the validity of his present confinement in prison. He has attempted to use this federal civil proceeding to raise questions which properly should have been brought up on appeal from his California state criminal conviction or by writ of habeas corpus or corum nobis, but certainly not by the instant action. The only real issue before the Federal Court herein (even assuming the appellant's own factual interpretation of what occurred), would be, as is set forth in appellant's opening brief, page 7, line 8, i.e., - whether appellees acted in excess of their jurisdiction and authority in arresting appellant in the City of Los Angeles.

Nowhere does appellant controvert the fact that appellees had gathered sufficient evidence to constitute reasonable and probable cause to believe that appellant had committed a felony. Under California Penal Code, Section 836(2), a peace officer may make an arrest in obedience to a warrant, or may, without a warrant, arrest a person:

" . . .

(2) When a person arrested has committed a felony

although not in his presence.

(3) Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed." (Emphasis added).

Again, appellant does not refute appellees' contention that they made his arrest in cooperation with members of the Los Angeles Police Department. Under California Penal Code, Section 817, the authority of a peace officer extends to any place in the state,

"(a) as to a public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs him, or (b) if he has the prior consent of the chief of police or person authorized to give such consent if the place is within a city or the sheriff or person authorized by him to give such consent if the place is within a county." (Emphasis added).

Therefore, it is clear that appellees, by making the subject arrest in cooperation with members of the Los Angeles Police Department were acting within the guidelines of Penal Code, Section 817(b). However, even assuming that appellees had acted alone, without the aid of members of the Los Angeles Police Department, the arrest would still have been clearly appropriate. As the court in People v. McCarty, 164 Cal. App. 2d 322, 330 P. 2d 484, at p. 328,

stated:

> "We find no merit in defendant's contentions that his arrest in Los Angeles by a police officer from Ventura County was unlawful, because the officer was without a warrant . . . the authority of an arresting officer in the instant case cannot be denied. It is undisputed that he was a peace officer (Penal Code, Section 817) and as such, had authority under Penal Code, Section 836(3) to make the arrest without a warrant if a felony had in fact been committed, and he had reasonable cause to believe that defendant had committed it. These conditions were fulfilled; the actual commission of a felony is unquestioned, and the victim had made a positive identification of the defendant as the perpetrator in the presence of the officers only a few hours before the arrest was made. Under these circumstances, a private person could have made this arrest without a warrant (Penal Code, Section 837(3)). It would appear anomalous to hold unlawful an arrest by a peace officer when the same arrest by a private citizen clearly would have been lawful (People v. Ball, 162 Cal. App. 2d 465, 468, 328 P. 2d 276)."

The courts of California have uniformly held that a police officer's power of arrest, when acting beyond the limits of the

geographical unit by which he is appointed becomes that which is conferred upon a private citizen in the same circumstances.

People v. Martin, 225 Cal. App. 2d 91,
36 Cal. Rptr. 924;
People v. Alvarado, 208 Cal. App. 2d 629,
25 Cal. Rptr. 437;
People v. Rodger, 241 A. C. A. 478,
50 Cal. Rptr. 559, and see also
5 Am. Jur. 2d Arrest, §50.

It is clear from the uncontroverted facts that appellees knew that a felony had been committed. A significant amount of evidence had been compiled to link the appellant to the commission of said felony. Said evidence included statements of victims and statements of other perpetrators of said felony. Under California Penal Code, Section 837, a private person may arrest another:

". . . (3) When a felony has been in fact committed, and he has reasonable cause to believe the person arrested has committed it."

There can be no argument that the search which immediately followed the arrest was also legal. As the court in People v. Alvarado, supra, stated:

"We assume, without deciding that a LosAngeles police officer lacks authority of a peace officer to make an arrest under Penal Code, Section 836,

when he is outside the city limits unless he is engaged in fresh pursuit or is executing a warrant authorizing such an arrest. (See 8 Opinions California Attorney General 149). An arrest by a city policeman outside his territorial jurisdiction is unquestionably valid if made upon grounds which would authorize a lawful arrest by a private citizen. (People v. Burgess, 170 Cal. App. 2d 36, 40, 338 P. 2d 524, People v. McCarty, 164 Cal. App. 2d 322, 328, 330 P. 2d 484)."

And the court goes on at page 632:

". . . If the arrest was lawful, the search was justified as an incident of the arrest, the premises searched being immediately adjacent to the place of arrest and under appellant's control. (People v. Dixon, 46 Cal. 2d 456, 459, 296 P. 2d 557)."

In light of the above cases, there can be no question as to the validity of the arrest made by appellees and the search which was made as an incident thereto, and as a careful reading of appellant's contentions will indicate, no other factual or legal issues exist which should have deterred the District Court from granting the Motion for Summary Judgment.

The instant case is quite similar to the case of Morgan v. Sylvester, 125 F. Supp. 380 (S. D. New York, 1954). Therein,

plaintiff set forth a claim under the Civil Rights Act, and the court stated:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary to obtain a review and a retrial of the state court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the federal courts. To uphold the claim here advanced upon such conclusionary allegations, ' would open the door wide to every aggrieved litigant in a state court proceedings and set the federal courts up as arbitrator of the correctness of every state decision."

And the court goes on at page 388:

> " . . . a litigant appearing pro se acquires no greater right than any other litigant and such appearance may not be used to deprive defendants of the same rights enjoyed by other defendants."

And further at page 389:

> " . . . a party moving for summary judgment bears the burden of showing the absence of any genuine issue of fact requiring a trial. Thereupon, the opposing party must offer contravailing evidence that such an issue does exist (See Radio City Music Hall Corp. v. U. S., 135 F. 2d 715

(2 Cir. 1943)). And, of course, if it is present, the court may not grant summary judgment. However, Rule 56 of the Federal Rules of Civil Procedure has not been rendered so sterile (Millstein v. Leland Hayward, Inc. (D. C.), 10 F. D. R. 198, 199) that a trial must be granted upon a claim which the papers show has no basis in fact. 'The rule should not be used by the court for the trial of disputed questions of fact upon affidavits, but when it is invoked by either party to a case and a showing is made by the movant, the burden rests on the opposite party to show that he has a ground of defense fairly arguable and of a substantial character. ' (See Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co., 137 F. 2d 871, 877 (6 Cir. 1943). "

The Morgan case clearly sets forth the appellees' position in the case at bar. Appellant has attempted to use this forum to subvert the findings of the State Court. He has made conclusionary allegations and has recited language from the Civil Rights Act, and the United States Constitution to attempt to uphold his claim. However, the only real issue raised was in fact the legal issue as to whether a police officer could make an arrest outside his jurisdiction. Appellees submit that the law clearly upholds their actions in this regard.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order granting appellees' Motion for Summary Judgment be affirmed.

Respectfully submitted,

DANIEL L. DINTZER and

ROBERT VALLIER

Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Daniel L. Dintzer

DANIEL L. DINTZER